



July 18, 2001

VIA ELECTRONIC FILING

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

**Re: In the Matter of Petition of Mpower Communications Corp. for
Establishment of a New Flexible Contract Mechanism Not Subject to
“Pick and Choose”; CC Docket No. 01-117**

Dear Ms. Salas:

Attached are reply comments of the Association for Local Telecommunications Services (ALTS) for filing in the above-captioned proceeding.

Sincerely,

/s/

Teresa K. Gaugler

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
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Petition of Mpower Communications Corp.)	CC Docket No. 01-117
for Establishment of a New Flexible)	
Contract Mechanism Not Subject to "Pick)	
and Choose")	
)	

**REPLY COMMENTS OF THE
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES**

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SUMMARY

Underlying Mpower's forbearance request here is the assumption that ILECs need and want CLEC wholesale customers to fill their excess network capacity. If this were the case, however, ILECs would have enough incentive to negotiate more beneficial terms under the current regime and provide those terms to all CLECs in order to increase their wholesale business. Because the ILECs are not interested in cultivating their wholesale business with CLECs, the FLEX contract mechanism proposed by Mpower would not provide additional incentive for the ILECs to deal fairly with CLECs. On the other hand, the FLEX contract mechanism would allow ILECs to negotiate sweetheart deals with preferred carriers and structure those contracts in such a way as to prevent other carriers from opting into them. ALTS submits that to the extent ILECs are able (and willing) to perform at higher standards, they should do so for all carriers on a nondiscriminatory basis, not pick and choose which carriers are worthy of that higher level of service.

Mpower argues that both ILECs and CLECs may support their proposal; however, Mpower is the only pure CLEC (with no ILEC affiliation) in this proceeding that supports such a mechanism. Verizon misinterprets Mpower's Petition as a representation of all CLECs; however, ALTS cautions the Commission not to do the same. The CLEC industry almost unanimously opposes this Petition, and it should be summarily dismissed by the Commission.

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REPLY COMMENTS OF THE
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services (“ALTS”) hereby files its reply comments in the above-referenced proceeding in response to the Commission’s Public Notice¹ requesting comment on the petition filed by Mpower seeking forbearance and a rulemaking regarding a new flexible contract mechanism, called “FLEX contract.”² The FLEX contract, as Mpower describes, would be an additional form of interconnection agreement between CLECs and ILECs, but it would be free from regulatory scrutiny and approval. Additionally, other carriers would be required to opt into the entire agreement rather than, as they do now, select only those terms and conditions dealing with individual services they desire. For the reasons discussed below, ALTS urges the Commission to deny the petition.

¹ *Pleading Cycle Established for Comments on Mpower Petition for Forbearance and Rulemaking*, CC Docket No. 01-117, Public Notice, DA 01-1348 (rel. June 4, 2001).

² *Petition for Forbearance and Rulemaking*, CC Docket No. 01-117 (filed May 25, 2001) (“Mpower Petition”).

Mpower requests that the Commission (1) forbear from applying or enforcing Section 252(i) “pick and choose” rules; (2) forbear from applying or enforcing Section 252(e) requiring submission of interconnection agreements to state commissions for approval or enforcement; and (3) institute a rulemaking to establish a federal program for notification, opt-in, and enforcement of FLEX contracts.³ Mpower claims that such contracts would facilitate wholesale relationships between ILECs and CLECs by creating incentives for carriers and encouraging innovation. Mpower suggests that CLECs would still have the “safety net” provided by the current interconnection regime because FLEX contracts would be an additional, rather than a replacement, mechanism for negotiating contracts. ALTS agrees with comments of other CLECs, however, that this is a clear case where such an exception would swallow the rule.⁴ ALTS supports Covad’s recommendation that the Commission spend no further resources on this issue by initiating a rulemaking proceeding, but should dismiss this petition outright.⁵

I. Mpower’s Underlying Premise About the Market and ILEC Incentives Is Incorrect

Underlying Mpower’s forbearance request is the assumption that ILECs need and want CLEC wholesale customers to fill their excess network capacity and that “it would be foolish to neglect this avenue for telecommunications revenues and ILECs increasingly have come to realize this.”⁶ If this were the case, however, ILECs would have enough incentive to negotiate more beneficial terms under the current regime and provide those terms to all CLECs in order to increase their wholesale business. But the

³ Mpower Petition at 3.

⁴ AT&T Comments at 7.

⁵ Covad Comments 2.

⁶ Mpower Petition at 5.

market has not matured to that level, and it is therefore illogical for the Commission to bless FLEX contracts as an incentive mechanism.

The ILECs' strategy is clear – they would rather forgo any revenue from CLECs than accommodate a CLEC that might take away their retail business. It is obvious from the ILECs' posturing for the past five years that they are not interested in creating a robust wholesale environment for their services. They have every incentive to impede competition, not fill their network with wholesale services.⁷

Mpower argues that FLEX contracts would be “predicated upon the view that ILECs actually want CLECs as wholesale customers and that they will seek to provide products and services that CLECs want and that they will do so on terms and conditions that are mutually beneficial.”⁸ This argument is also faulty. Underlying this premise is the assumption that the terms and conditions of current interconnection contracts are insufficient to provide incentive for ILECs to perform up to the level they are capable, and that additional incentives would encourage them to perform at higher levels.

First, ALTS submits that to the extent ILECs are able (and willing) to perform at higher standards, they should do so for all carriers on a nondiscriminatory basis, not pick and choose which carriers are worthy of that higher level of service. Second, for Mpower's premise to hold true that the ILECs would perform more suitably with greater incentives, CLECs would necessarily have to give up something in negotiating FLEX contracts that they have not already given up through the current process. Otherwise, the deal would be no sweeter for the ILECs. Thus, even CLECs that are party to the FLEX contracts may be worse off than with the current arrangements.

⁷ Sprint Comments at 3; Covad Comments at 5-6.

ALTS agrees with Sprint that Mpower's assumption that ILECs and CLECs bargain on equal footing is incorrect.⁹ As Focal notes, the current market is not a competitive one where CLECs have a choice of wholesale providers¹⁰ ILECs continue to have a stranglehold on the market which gives them all the bargaining power. This is not a case where each party wants something that the other can provide; the ILECs are not interested in cultivating the CLECs' wholesale business because the ILECs are in control of ninety percent of the market and want little to do with giving up that share.¹¹

Moreover, Mpower provides no criteria to distinguish FLEX contracts from those subject to Section 252 other than to say that the parties would voluntarily agree to forbearance.¹² Unfortunately, such a designation may not be voluntary on the part of the CLEC because the ILECs could, and most likely will, use their leverage to coerce some CLECs into negotiating a FLEX contract under the threat of making negotiations under Section 252 unduly burdensome. Furthermore, ALTS agrees with Z-tel that the opportunities for "greenmail" would be increased under the FLEX contract regime, whereby ILECs would offer more beneficial terms to CLECs that agreed to support certain regulatory actions by the ILECs.¹³ The Commission should not condone a process in which the ILECs could coerce CLECs through threats and promises to accept a contractual arrangement that may not be entirely beneficial to the contracting CLEC and would almost certainly be discriminatory to CLECs outside of the arrangement.

⁸ Mpower Petition at 6.

⁹ Sprint Comments at 2.

¹⁰ Focal Comments at 2.

¹¹ ASCENT Comments at 6.

¹² Mpower Petition at 8.

¹³ Z-tel Comments at 14.

II. The FLEX Contract Mechanism Would Allow Discrimination and Mpower's Petition Fails to Establish a Prima Facie Case for Forbearance

Mpower's Petition makes almost no attempt to conduct a forbearance analysis under Section 10, and ALTS agrees with ASCENT that Mpower has not established its prima facie case for forbearance.¹⁴ The Petition merely lays out the statutory framework and then declares it satisfied. Mpower cites the language in Section 10(b) as its rationale for this conclusion; however, that section is intended only to elaborate on what the Commission should consider in determining whether forbearance would be in the public interest under Section 10(a)(3).¹⁵ It does not subsume the first two prongs of the forbearance test dealing with discrimination and harm to consumers. For the same reasons that the Commission first found the "pick and choose" rule to be necessary under Section 252(i), the rule is still necessary to prevent discriminatory treatment of carriers and to protect consumers from harm created by fewer competitive options.

As many commenters point out, the FLEX contract regime would allow an ILEC to select its favored carriers, whether they be affiliates or carriers that do not pose a significant threat to the ILEC.¹⁶ It would allow ILECs to evade the core nondiscrimination requirements of Section 252(i) as most contracts would likely default to FLEX contracts.¹⁷ Using their bargaining power, ILECs would insist on all contracts being designated as FLEX contracts in order to avoid the requirements of Section 251 and 252. It is not enough for Mpower to say that carriers would maintain the option of negotiating under the current regime. ALTS submits that the ILECs would not use the FLEX contract regime to negotiate fairly with CLECs, but would use the opportunity to

¹⁴ ASCENT Comments at 4.

¹⁵ 47 U.S.C. § 160.

¹⁶ AT&T Comments at 2; WorldCom Comments at 3; Focal Comments at 1.

coerce CLECs into negotiating contracts that would be discriminatory to other carriers. Thus, some CLECs would gain preferential treatment while others would be left with sub-par performance.

Moreover, in many cases the contracting CLEC would be willing to designate a contract as a FLEX contract because the burden of discrimination would not fall on its shoulders – it would fall on carriers that are not parties to the contract.¹⁸ Mpower argues that any similarly-situated carrier could opt into the entire contract and makes a feeble attempt to argue that FLEX contracts would not likely contain “poison pill” provisions that would make the agreements unappealing to other carriers.¹⁹ In asserting that “there would be no incentive for CLECs to adopt such an agreement if the terms were not beneficial,” Mpower ignores the fact that the CLEC negotiating the contract is not the one to be protected from discrimination.

As described above, ILECs have bargaining power as the sole provider of wholesale services. A negotiating CLEC may be forced to enter into a contract that is not beneficial to its business in every aspect but is satisfactory enough to meet its basic interconnection needs, particularly if the CLEC wants to enter the market quickly. Moreover, that CLEC might willingly agree to a provision that would be inconsequential to itself but detrimental to many other CLECs, thereby negating those carriers’ opportunities to opt-in to the agreement.²⁰

Mpower’s argument that ILECs should have incentive to make the agreement attractive to other CLECs in order to grow their wholesale business is absurd and

¹⁷ AT&T Comments at 7;

¹⁸ AT&T Comments at 3; Focal Comments at 4.

¹⁹ Mpower Petition at 8.

²⁰ Focal Comments at 4; WorldCom at 3.

contrary to its argument that ILECs need further incentive in order to serve CLECs adequately. Mpower states that “certainly, ILECs would have no incentive to impede good wholesale business deals.”²¹ If this were true, the ILECs would negotiate better terms with their wholesale customers under the current regime. ILECs continue to strive to protect their core retail business and they would continue to do so even if some form of FLEX contracts were permitted. The addition of a FLEX contract mechanism would not create incentives for the ILECs to negotiate more fairly with CLECs or to develop “good wholesale business deals.”

Mpower mourns the fact that there is “a great sameness and very little meaningful choice” among contracts with the ILECs;²² however, the essence of nondiscrimination is that every carrier has the same opportunities and choices. Mpower argues that the use of FLEX contracts would encourage negotiation of “package deals” regarding “a broad range of business interests but especially provisioning, quality of service, and volume and term discounts.”²³ While this may be so, it is exactly the result that Section 252(i) was intended to eliminate.

If the ILECs are able to provide quicker provisioning and higher quality of service than they currently provide, all CLECs should benefit. The ILECs should not be allowed to negotiate faster provisioning intervals with certain CLECs merely because that CLEC will agree to negotiate a FLEX contract that would not likely apply to other CLECs. Such a result would be the very epitome of discrimination.

²¹ Mpower Petition at 16.

²² *Id.* at 9.

²³ *Id.* at 3.

Mpower argues that this mechanism would “provide a reasonable, deliberate step toward more effective competition, which both ILECs and CLECs may support.”²⁴ As evidenced by the comments in this proceeding, Mpower is the only pure CLEC (with no ILEC affiliation) that supports such a mechanism. Verizon misinterprets Mpower’s Petition as a representation of all CLECs; however, ALTS cautions the Commission not to do the same.

The CLEC community almost unanimously opposes the forbearance requested by Mpower. ALTS also agrees with Covad and Z-tel that the Commission should be very skeptical of a contractual arrangement that the parties seek to hide from regulatory scrutiny and bar from admission in other proceedings.²⁵ One must assume that those contracting parties have something to hide if they seek to insulate the contract from review. ALTS agrees with WorldCom that prior approval of agreements under Section 252(e) is central to implementation and enforcement of Sections 251 and 252,²⁶ thus that process should not be eliminated. Moreover, ALTS agrees that the Commission cannot override the rules of evidence by prohibiting parties from submitting relevant evidence in state or judicial proceedings.²⁷

ALTS agrees with Mpower that “CLECs need quality and timely performance at reasonable rates.”²⁸ However, ALTS strongly disagrees with its assertion that the use of FLEX contracts is the best or only way for that to occur. ALTS submits that adherence to the current interconnection negotiation/arbitration process and strict enforcement of the Commission’s rules would lead to such a result. Overhauling the current interconnection

²⁴ *Id.*

²⁵ Covad Comments at 4; Z-tel Comments at 14.

²⁶ WorldCom Comments at 6.

²⁷ Covad Comments at 4; Z-tel Comments at 13-14.

negotiation process would be disruptive and would create uncertainty as carriers wade through the new process, unsure how to best proceed and enforce their rights under the Act.²⁹ The Commission should not stir up the interconnection process by adopting, or even entertaining, Mpower's proposal.

CONCLUSION

For the foregoing reasons, the Commission should deny Mpower's Petition.

Respectfully Submitted,

/s/ Teresa K. Gaugler

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²⁸ Mpower Petition at 6.

²⁹ Focal Comments at 7-8.